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Division III
State of Washington
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34730-3-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT
v.

GLEND A TUCKER, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUE PRESENTED

Did the State present sufficient evidence that the firearm recovered from Ms. Tucker's vehicle was a gun "in fact," rather than a toy gun or gun-like object, which was necessary to support the conviction for first-degree unlawful possession of a firearm?

II. STATEMENT OF THE CASE

Procedural history.

Glenda Tucker was charged in the Spokane County Superior Court with unlawful imprisonment and first-degree unlawful possession of a firearm. CP 37-38. Ms. Tucker was convicted by a jury of both offenses. CP 210, 211. With an offender score of "12" on both counts, Ms. Tucker was sentenced to the low-end of the standard range. RP 240, 242.

Substantive facts.

Caryn Crandall met Derek Williams in October of 2015. RP 108.¹ Ms. Crandall was working as a prostitute for Mr. Williams during that October. RP 200. Mr. Williams had paid Ms. Crandall to make his wife jealous during that time frame. RP 109. On October 24, 2015, Ms. Crandall was in the back yard of a residence near Sprague Avenue attempting to borrow a phone. RP 111. Defendant Glenda Tucker was a friend of

¹ The following was taken from the verbatim report of proceedings at trial dated July 25 and 26, 2016.

Mr. Williams. RP 108, 200. At that time, Mr. Williams and Ms. Tucker arrived in a car, which Ms. Tucker was driving. RP 111. Mr. Williams grabbed Ms. Crandall and forced her into the backseat of the automobile. RP 112. Mr. Williams told Ms. Crandall that he was taking her to his house, to tie her up and place her in the basement, to work off a debt for previously causing damage to his van.² RP 111-12. The vehicle, identified as a Hyundai Sonata, travelled approximately two to three blocks before Ms. Crandall jumped out of the car. RP 114, 162. She sustained an ankle fracture as the car wheel travelled over her foot. RP 118.

After Ms. Crandall jumped out of the car, Mr. Williams followed and restrained her. RP 119. Mr. Williams made threats to Ms. Crandall that she was going to jail because she had damaged his van. RP 119. Thereafter, Ms. Crandall bit Mr. Williams, and Mr. Williams proceeded to strangle Ms. Crandall, which caused her to lose consciousness. RP 119. At this point, Ms. Tucker called 911 at 10:05 p.m. RP 120, 166.

Officers responded to the scene at 10:11 p.m., and contemporaneously observed a man, later identified as Mr. Williams, placing his right arm over Ms. Crandall's neck, holding her down and attempting to strangle her. RP 150, 157, 172. During the investigation,

² Ms. Crandall admitted to previously taking the van without permission, causing an accident and damage to Mr. Williams's vehicle. RP 109-10.

police determined that Ms. Tucker was the registered or primary owner the vehicle involved in the incident. RP 158, 233.

Officer Anthony Guzzo spoke with Ms. Tucker at the scene. She claimed that she and Mr. Williams picked up Ms. Tucker at a local market and began driving around. RP 228. An argument ensued between Mr. Williams and Ms. Tucker over the cost of the damage to his vehicle. RP 231.

After the event, Ms. Tucker told a friend, Christieann Schuchman, that she and Mr. Williams were together in a car, and Ms. Tucker told Mr. Williams several times that she saw Ms. Crandall. Mr. Williams told her to stop the car and she jumped out. RP 208. Ms. Tucker said that she put a gun to Ms. Crandall's head and told her to get into the car. RP 208-09. Ms. Tucker stated she came into possession of "a brand new pretty gun. She said that the numbers of the guns were a 30-30 and a 30-11."³ RP 209. Ms. Tucker further requested that Ms. Schuchman tell others that the firearm belonged to Mr. Williams. RP 213. Ms. Schuchman and Ms. Tucker had hatched this plan because Ms. Schuchman did not want Ms. Tucker to be sent to prison. RP 223.

³ A .30-30 is a common, chambered rifle. https://en.wikipedia.org/wiki/.30-30_Winchester#Rifles_and_handguns_chambered_in_.30-30.

A search warrant was obtained to search the vehicle for a firearm based upon an officer's observation through the car window of a rifle case lying on the rear floorboard and because officers had determined Ms. Tucker had a prior conviction for a felony. RP 159; Ex. 8-14. During the search, a rifle was found inside the case. RP 160, 162-62. The firearm was within the arm's reach of Ms. Tucker in the car. RP 162. Ms. Crandall's purse was also located inside the car. RP 176. Ms. Tucker had previously been convicted of conspiracy to deliver cocaine. RP 141-43.

III. ARGUMENT

SUFFICIENT EVIDENCE SUPPORTS THE CONVICTION FOR FIRST DEGREE UNLAWFUL POSSESSION OF A FIREARM.

Ms. Tucker argues there was insufficient evidence regarding her conviction for first degree unlawful possession of a firearm conviction. Specifically, Ms. Tucker claims the State did not establish the firearm recovered from her vehicle was a gun "in fact," rather than a toy gun or gun-like object. The State bears the burden of proving all the elements of an offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

A sufficiency of evidence challenge is reviewed de novo. *Rich*, 184 Wn.2d at 903. The standard of review for a sufficiency of the evidence

assertion in a criminal case is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found each element of the offense proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Rich*, 184 Wn.2d at 903. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Witherspoon*, 180 Wn.2d 875, 883, 329 P.3d 888 (2014).

The State may establish the elements of a crime by either direct or circumstantial evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); *State v. Brooks*, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). In that regard, the credibility of witnesses and the weight of the evidence is the exclusive function of the trier of fact, and is not subject to review. *See State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The trier of fact may draw inferences from the evidence so long as those inferences are rationally related to the proven facts. *State v. Jackson*, 112 Wn.2d 867, 875, 774 P.2d 1211 (1989). A rational connection must exist between the initial fact proven and the further fact presumed. *Jackson*, 112 Wn.2d at 875. Accordingly, “[a]ppellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact. Instead, they must defer to the factual findings made by the trier-of-fact.” *Quinn v. Cherry Lane Auto Plaza, Inc.*,

153 Wn. App. 710, 717, 225 P.3d 266 (2009), *review denied*, 168 Wn.2d 1041 (2010).

RCW 9.41.040(1)(a) provides that a person is guilty of first degree unlawful possession of a firearm if he or she has been convicted of a serious offense⁴ and “owns, has in his or her possession, or has in his or her control any firearm.” Possession of a firearm may be actual or constructive. *State v. Manion*, 173 Wn. App. 610, 634, 295 P.3d 270 (2013).

Ms. Tucker claims the State did not establish that the firearm recovered from her vehicle was a gun “in fact.”

A firearm need not be operable during the commission of a crime to constitute a “firearm” within the definition of RCW 9.41.010(9) (firearm definition). *State v. Faust*, 93 Wn. App. 373, 376, 967 P.2d 1284 (1998); *State v. Raleigh*, 157 Wn. App. 728, 734, 238 P.3d 1211 (2010), *review denied*, 170 Wn.2d 1029 (2011); *State v. Wade*, 133 Wn. App. 855, 873, 138 P.3d 168 (2006), *review denied*, 160 Wn.2d 1002 (2007). The relevant question is whether the firearm was a gun “in fact” or a toy gun or gun-like object incapable of being fired. *Faust*, 93 Wn. App. at 379-81 n. 6.

⁴ In the present case, a certified copy of a judgment and sentence regarding Ms. Tucker’s felony conviction for conspiracy to deliver a controlled substance – cocaine was admitted into evidence, as the prior serious offense. RP 140-43; Ex. 15. *See* RCW 9.41.010(23)(b).

Indeed, the State is not required to enter an actual firearm into evidence at trial; witness testimony alone can provide sufficient evidence to establish a gun “in fact.” For example, in *State v. Tasker*, 193 Wn. App. 575, 373 P.3d 310, *review denied*, 186 Wn.2d 1013 (2016), a witness testified the defendant pointed a gun at the victim demanding her purse. The victim saw the gun at close range, and although not familiar with guns, she had observed guns in different circumstances (i.e., news programs and magazines) and had heard a clicking sound behind her head during commission of the crime. *Id.* at 595. This Court found that the circumstantial evidence was sufficient to establish the gun was a “firearm” for purposes of a firearm enhancement because the gun appeared to be a firearm under the circumstances it was used, as defined under RCW 9A1.010. *Id.* at 594.

Likewise, in *State v. Anderson*, 94 Wn. App. 151, 159, 971 P.2d 585 (1999), *reversed on other grounds*, 141 Wn.2d 357 (2000), police found a loaded gun under the seat of the defendant’s truck. The defendant argued that because the police did not test the gun, there was no way to prove that the gun was capable of being fired as required by the statute. The reviewing court found the trier of fact could find the gun was a firearm where police officers testified the gun was loaded, appeared to be a real gun, the gun displayed a serial number, and gun was admitted as an exhibit at trial. *Id.* at 162-63. Although no direct evidence of operability was presented at trial,

Division One held that sufficient evidence was presented from which any rational trier of fact could conclude that the gun was a “real gun” and not a toy gun. *Id.* at 162. *See also State v. McKee*, 141 Wn. App. 22, 30-32, 167 P.3d 575 (2007), *review denied*, 163 Wn.2d 1049 (2008) (victim testified regarding the weight and feel of the gun, that she saw a “peripheral something to my head,” and to the way in which defendant wielded it, and there was evidence defendant had a real gun and had access to other guns); *Faust*, 93 Wn. App. at 381 n. 6 (“eyewitness testimony to a real gun that is neither discharged nor recovered is sufficient to support deadly weapons and/or firearms penalty enhancements”); *State v. Mathe*, 35 Wn. App. 572, 581-82, 668 P.2d 599 (1983) (the State established the defendant “used a real and operable gun” with the testimony of two eyewitnesses who described in detail the guns used by the defendant), *affirmed*, 102 Wn.2d 537 (1984); *State v. Bowman*, 36 Wn. App. 798, 803, 678 P.2d 1273, *review denied*, 101 Wn.2d 1015 (1984) (eyewitnesses similarly described the gun and testified to their belief that the gun was real); *State v. Goforth*, 33 Wn. App. 405, 410-12, 655 P.2d 714 (1982) (evidence was sufficient to support inference that “gun was operable in fact” where witnesses who were familiar with shotguns testified that the defendant used a real shotgun).

Here, sufficient evidence was presented at trial from which any rational trier of fact could conclude that the weapon was a gun “in fact” and that the State met its burden of proving Ms. Tucker possessed a firearm as defined by RCW 9.41.010(1). When discussing the contents of Ms. Tucker’s vehicle, Officer Huffman stated: “So, you have a passenger seat. There [were] items on the passenger seat. There [were] items on top of the center of the rifle but you could still see the butt end of the case.” RP 188. Upon examination, the jury would have observed the rifle embodied a visible serial number, manufacturer name, and a model number and caliber, a .30-30. In that regard, the Code of Federal Regulations requires all firearms be stamped, amongst other things, with a visible serial number, manufacturer, model number and caliber or gauge.⁵ If inspected,

⁵ 26 C.F.R. § 478.92(a)(1)(i) and 26 C.F.R. § 478.92(a)(1)(ii)(A), (B) and (C), state, in relevant part:

(a)(1) Firearms. You, as a licensed manufacturer or licensed importer of firearms, must legibly identify each firearm manufactured or imported as follows:

- (i) By engraving, casting, stamping (impressing), or otherwise conspicuously placing or causing to be engraved, cast, stamped (impressed) or placed on the frame or receiver thereof an individual serial number. ...
- (ii) By engraving, casting, stamping (impressing), or otherwise conspicuously placing or causing to be engraved, cast, stamped (impressed) or placed on the frame, receiver, or barrel thereof certain additional information. This information must be placed in a manner not susceptible of being readily obliterated, altered, or removed. For firearms

the jurors would have observed such required markings on the firearm collected from Ms. Tucker's vehicle.⁶

The State introduced the firearm recovered from Ms. Tucker's vehicle into evidence for the jury's consideration and the photographs taken of the firearm at the property facility.

[Deputy Prosecutor]: Could you please open up State's [exhibit] 3, examine what is inside of State's [exhibit] 3. And -- Officer Huffman, do you recognize the firearm?

[Officer Huffman]: I do.

[Deputy Prosecutor]: Where did you first see this firearm?

[Officer Huffman]: Inside the case.

[Deputy Prosecutor]: And is this the case that you found pursuant to your search warrant in Ms. Tucker's vehicle?

[Officer Huffman]: It is.

[Deputy Prosecutor]: Anything change about this firearm?

manufactured or imported on and after January 30, 2002, the engraving, casting, or stamping (impressing) of this information must be to a minimum depth of .003 inch. The additional information includes:

(A) The model, if such designation has been made;

(B) The caliber or gauge;

(C) Your name (or recognized abbreviation) and also, when applicable, the name of the foreign manufacturer;

⁶ In the present case, the firearm has been designated as Ex. P-3; however, pursuant to RAP 9.8(b), the exhibit will not be transferred to the Court unless directed to do so.

[Officer Huffman]: Nope.

[Deputy Prosecutor]: Is it in substantially the same condition as when you found it?

[Officer Huffman]: Yes.

RP 163; Ex. 8, RP 159 (photo of suspect vehicle), Ex. 9, RP 160 (photo of suspect vehicle), 12, RP 160 (photo of the rifle in the suspect vehicle), Ex. 13, RP 160, (photo of rifle case), Ex. 14, RP 160 (photo of rifle after removal from the rifle case). Significantly, Ms. Tucker stated she came into possession of “a brand new pretty gun” and the numbers of the guns were “a 30-30 and a 30-31.” In addition, Ms. Tucker requested that Ms. Schuchman inform others that the firearm belonged to Mr. Williams.

Jurors had the opportunity to determine whether the weapon was a firearm “in fact” because the weapon was entered into evidence, and as presented, whether it had the common and readily identifiable features of a firearm “in fact.”

For instance, in *United States v. Kirvan*, 997 F.2d 963 (1st Cir. 1993), a case involving carrying a firearm⁷ during a crime of violence, former 18 U.S.C. § 924(c), the court affirmed the conviction although no gun was

⁷ The term “firearm” is defined by federal statute, in relevant part, as “any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive ... or the frame or receiver of any such weapon.” 18 U.S.C. § 921(a)(3).

produced at trial. There was only eyewitness testimony that the defendant brandished a gun during the commission of his crime. The witness described the gun as black and had a five-inch barrel while another witness testified that the gun appeared to be shiny and silver in color, and that it was very large for a handgun. The appellate court held that the jury's conclusion that the object was a real gun was not irrational since the description of the gun was of "plausible size, colored like a real gun, and quite heavy." *Id.* at 966. The court also noted that "while a good replica might still fool a witness at a distance, the chances decline, where, as here, the witness saw the gun, stationary and at a close distance, for at least half a minute." *Id.* at 967.

The same is true in the present case. The jury viewed the firearm in a stationary position in the courtroom, and, if they chose, at the time of deliberations. Certainly, a lay person's (juror) examination of a weapon could determine the differences between a gun "in fact" and a fake gun or toy gun. *See, United States v. Dobbs*, 449 F.3d 904, 910-11 (8th Cir. 2006) (holding that government could prove an object is a firearm without a physical examination of the object and a lay person may testify as to whether an object meets the statutory definition of a firearm); *United States v. Roberson*, 459 F.3d 39, 47 (1st Cir. 2006) (descriptive lay testimony can be sufficient to prove that the defendant used a real gun); *United States v. Taylor*, 54 F.3d 967, 976 (1st Cir. 1995) (concluding that the evidence was

sufficient to prove the gun was real where three eyewitnesses to a bank robbery, who observed the object held by the defendant at close range, testified that it was a gun).

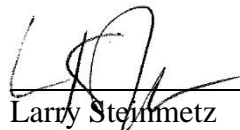
Moreover, there was no evidence the firearm was defective or damaged so that it lost its character as a firearm. The evidence, viewed in the light most favorable to the State, was sufficient to establish the weapon was found in Ms. Tucker's vehicle was a gun "in fact" and not a toy gun or a gun-like object incapable of being fired.

IV. CONCLUSION

For the reasons stated herein, the State requests this Court affirm the judgment and sentence.

Respectfully submitted this 7 day of February, 2018.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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STATE OF WASHINGTON,

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GLEND A TUCKER,

Appellant.

NO. 34730-3-III

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington,
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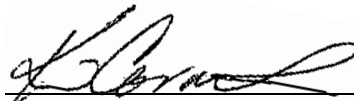
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